Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter Of	)	
	)	
8YY Access Charge Reform	)	WC Docket No. 18-156
	)	

REPLY COMMENTS OF O1 COMMUNICATIONS, INC.

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O1 Communications, Inc. ("O1") submits these Reply Comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") in WC Docket No. 18-156, FCC 18-76 (rel. June 5, 2015).

O1 supports the comments of the parties in the opening round of comments that argue (1) the Commission should confirm its policy against interexchange carrier ("IXC") exercise of self-help non-payment tactics in disputes with local exchange carriers ("LECs") over intercarrier compensation charges and impose penalties on IXCs that fail to comply;[1] (2) the Commission should clarify that competitive LEC originating access charges should be benchmarked to the competing incumbent LEC location where the access service functions are performed and in any event, no less than the rates that are required for a competitive LEC to recover its costs;[2] (3) Commission rules addressing abusive practices of bad actors that have made fraudulent calls to toll free numbers in furtherance of 8YY access arbitrage schemes should be narrowly tailored to address the abuses;[3] (4) the Commission should avoid adopting rules that eliminate competition in the intermediate local or long distance markets;[4] and (5) the Commission should adopt a rule that requires terminating carriers to accept requests from originating carriers to directly interconnect.[5]

DISCUSSION

I. The Commission Should Confirm Its Policy Against IXC Self-Help Non-Payment Tactics and Act to Prevent these Abuses.

[1] Comments of Teliax, Inc. and Peerless Network, Inc., *In the Matter of 8YY Access Charge Reform,* WC Docket No. 18-156 (Sept. 4, 2018) (*"T&P Comments"*) at 7-10.
[2] *Id*. at 10-15.
[3] *Id.* at 16 and 21-22; Comments of West Telecom Services, LLC, *In the Matter of 8YY Access Charge Reform,* WC Docket No. 18-156 (Sept. 4, 2018) ("*West Comments"*) at 1-12.
[4] *West Comments* at 22-24.
[5] *T&P Comments* at 28-29; *West Comments* at 13-16.

In their opening Comments, Teliax and Peerless begin their discussion by emphasizing the urgent need for the Commission to curtail abusive self-help non-payment tactics of the large IXCs: "a key market and regulatory abuse related to 8YY access charges that the FCC must address is the largest IXCs' use of self-help to 'solve' disputes….Until this *modus operandi* of large corporations such as AT&T and Verizon is halted, unlawful self-help measures will continue to undermine the intercarrier compensation system."[6] Teliax and Peerless describe the abusive conduct of AT&T and Verizon in withholding payment without valid legal or factual support resulting in stifled competition, innovation and network investment and "dire" financial consequences for smaller carriers.[7] O1 has experienced the same abuse and has suffered the same financial harm as a result of AT&T and Verizon's unlawful non-payment tactics. These tactics have been raised with the Commission in several intercarrier compensation proceedings.[8] O1 agrees with *T&P Comments* that the large IXC self-help scheme is systematic fraud and for all the reasons set forth in the *T&P Comments* as well as O1's Comments with regard to the *CenturyLink Petition for Declaratory Ruling,* it is well past time for the FCC to reign in these practices.

II. The Commission Should Clarify that Competitive LEC Originating Access Charges Should be Benchmarked to the Competing Incumbent LEC Location Where the Access Service Functions are Performed.

The Commission seeks comments on the practice of benchmarking, especially the question of whether a competitive LEC should be required to benchmark its rates to the tariffed rate of the incumbent LEC where a toll free call originates or where the call is handed off to the

[6] *T&P Comments* at 7-8.
[7] *Id*. at 8-10.
[8] See e.g., Comments of O1 Communications, Inc. and Peerless Network, Inc., *In the Matter of the Connect America Fund,* WC Docket No. 10-90, CC Docket No. 01-92 (June 18, 2018) at 17-21; May 31, 2018 Notice of Ex Parte Communication, WC Docket No. 18-155; WC Docket No 10-90; CC Docket No. 01-92, Tamar Finn, Counsel for Bandwidth, Inc.

IXC serving the 8YY customer after the LEC switches and performs a toll free database query.[9] O1 agrees with those commenters that propose that the rates be benchmarked to those of the competing incumbent LEC where the switching and query functions are performed, that is, the location of the competitive LEC switch.[10]

47 C.F.R. § 61.26 governs the tariffing of competitive interstate switched exchange access services. Section 61.26(b)(1) provides, in pertinent part, "a CLEC shall not file a tariff for its interstate switched exchange access services that prices those services above the higher of the rate charged for such services by the competing ILEC…." "Competing ILEC" is defined as, "the incumbent local exchange carrier…that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC." Section 61.26(a)(2). In the past when the Commission considered how the benchmarking rule applied to 8YY traffic, it held that competitive LECs should benchmark their 8YY switched access rates to the incumbent LEC rate where the competitive LEC receives the traffic and hands it off to the IXC. *In re AT&T Services, Inc.*, 30 FCC Rcd 2586, 2591 at para. 17 ("[T]he aggregate rates of AT&T Michigan, an ILEC operating in and around [the location where the CLEC receives the 8YY traffic] for the same exchange access functions …."); *Great Lakes Comm. Corp. v. AT&T Corp.*, 823 F.3d 998, 1004-1005 (D.C. Cir. 2016). O1 requests that the Commission adopt this as a rule to clarify any ambiguity that currently exists.

A settled rule is necessary to ensure uniform treatment nationwide and between and among all carriers. It would also curb IXC gamesmanship that O1 has witnessed regarding this issue. AT&T, for one, appears to pick and choose the rule to apply to the benchmarking of 8YY originating switched access charges based, not on a principled rule of law but instead on which

[9] *FNPRM* at ¶ 25.
[10] *T&P Comments* at 10-15.

rate would be the lowest. In its dispute with Teliax over 8YY access charges, AT&T takes the position that Teliax should charge a nationwide average rate of incumbent LEC originating access charges based on where the call is originated rather than the location of the Teliax switch.[11] The nationwide average is lower than the rate in Teliax' tariff, which is based on where Teliax performs the functions. On the other hand, in its dispute with O1, AT&T argues that the rate should be benchmarked to the rate of the competing incumbent LEC where O1's switch is located. In California, the competing incumbent LEC is AT&T California, whose tandem switched access rates are subject to three different pricing zones. Despite the fact that O1's switch is located nearest to an AT&T California zone 3 wire center, which is the highest of the three zone rates, AT&T unilaterally decided to compensate O1 at the zone 1 rate, which is significantly lower.

III. Commission Rules Addressing Abusive Practices of Bad Actors That Have Made Fraudulent Calls to Toll Free Numbers in Furtherance of 8YY Access Arbitrage Schemes Should be Narrowly Tailored to Address the Abuses.

O1 agrees with *West's Comments* that the Commission "reject the efforts of large interexchange carriers ("IXCs") (and of any others seeking free use of upstream networks in an 8YY call path) to use the pretext of eliminating specific bad practices to propel the Commission into hastily implementing major changes in the 8YY access charge regime that would authorize freeloading on the networks of upstream service providers."[12] Rather than "seriously jeopardize market competition" by eliminating compensation due to innocent network providers for their roles in call routing and other services necessary for call completion, the Commission should

[11] Teliax Motion for Summary Judgment, *Teliax, Inc. v. AT&T Corp.,* Case No. 1:15-cv-01472 (D. Colo.) Dkt 59 (filed 9/2/16) at 3 ("AT&T managers unilaterally and improperly have calculated "national average tandem rate" and a "national average DBQ rate" that are not provided for in Teliax's FCC Tariff.").
[12] *West Comments* at 3.

focus its efforts to eliminate fraud associated with 8YY calls in the proceedings aimed to address unlawful Robocalls.[13] In that docket, the Commission is working together with industry to "identify specific, enforceable criteria for targeting illegal calls that cannot be abused while ensuring providers have sufficient flexibility available to adapt to dynamic calling patterns."[14] Since March 2017, the Commission has issued two NPRMs and the Consumer and Governmental Affairs Bureau recently issued a Public Notice requested that commenters refresh the record. Numerous comments have been filed by industry members, consumers and other interested parties relating to the very specific issues involved in combating fraud in today's telecommunications network, including that relating to toll free fraud and traffic pumping. Rather than issuing broad rules that may result in harmful unintended consequences, O1 agrees that the Commission should continue to address bad actors on a case by case basis through complaint proceedings and in other proceedings targeted to address the specific problems raised.[15] As West concludes, "[p]rompt implementation of narrowly targeted rules may well prove so effective in eliminating arbitrage situations that it will obviate the need to consider broader reform of the 8YY intercarrier compensation regime, which would be in the public interest by avoiding unnecessary expenditure of resources by the Commission as well as by interested parties."[16]

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[13] *Advanced Methods to Target and Eliminate Unlawful Robocalls,* CG Docket No. 17-59 (2017) ("*Robocalling Docket*").
[14] Public Notice, *Advanced Methods to Target and Eliminate Unlawful Robocalls,* CG Docket No. 17-59 (rel. Aug. 2018).
[15] Indeed, parties filed comments in the Robocalling docket complaining that over-broad application of practices meant to combat robocalling has resulted in the blocking of lawful calls. *See e.g.*, Sept. 24, 2018 Letter from Encore, CG Docket No. 17-59 at 1 ("Unfortunately, false positives – service providers blocking lawful calls thought to be illegal Robocalls – has become an enormous unintended consequence of the Commission's rule to target and eliminate unlawful Robocalls.")
[16] *West Comments* at 5-6.

IV. The Commission Should Avoid Adopting Rules that Eliminate Competition in the Intermediate Local or Long Distance Markets.

The Commission proposes to move originating end office and tandem access to mandatory bill and keep absent an agreement between carriers to the contrary.[17] O1 agrees with commenters that remind the Commission that independent competitive tandem services, sometimes referred to as "intermediate services" are "a fundamental component of today's telecommunications network backbone, providing carriers of all types with efficient traffic exchange options."[18] Failure of intermediate providers to recover their costs and a reasonable profit will eliminate this valuable competitive market and enable the large IXCs to re-establish their monopolies.[19]

Transiting, tandem switching and tandem transport services are provided when a carrier serves as an intermediary in the call flow, transmitting traffic between two carriers that directly serve the calling and called parties. Intermediaries do not directly serve either the called or calling parties. Traditionally, local intermediary services are described as "transit" services and long distance intermediary services are described as "tandem switching and tandem transport."[20] The functions performed are the same. The discussion that follows applies equally to local and long distance intermediary services.

The existence of intermediary service providers is not a sign of arbitrage activity or an opportunity for inappropriate cost-shifting by originating carriers. Rather, it is a sign of ongoing competition in the market to incumbent LEC and IXC services which provide intermediate

[17] *FNPRM* at ¶30.
[18] *West Comments* at 3, note 10.
[19] *Id*. at 6-8.
[20] IXCs often refer generally to intermediate carriers as bad actors without acknowledging that they themselves operate as intermediate long distance providers that have no direct relationship with calling and called parties. Independent intermediate long distance providers are the large IXCs' competitors in this market.

delivery of traffic between originating and terminating carriers. For various reasons, carriers and other service providers do not always physically interconnect with each other. The partnership between Voice over Internet Providers ("VoIP") providers and LECs is a key example of the use of intermediate carriers efficiently to complete calls between end users of different service providers when a service provider does not own its own network or interconnect with the PSTN. VoIP providers typically do not maintain their own networks and do not enter into Section 251 interconnection agreements with ILECs. Service providers, including VoIP providers, directly serving the calling party generally bear the cost to transit customer traffic to the outside world and have choices of how to do so. They can employ their own infrastructure, lease infrastructure from other carriers, purchase switched transport by the minute of use, or use a variety of these options at once. If the sending provider relies on another provider rather than build its own network, it can choose among a number of wholesale providers. That provider may be the terminating carrier, a third-party alternative or some combination of the two. No matter which option is chosen, the financial obligation to transport the call remains with the sending provider. If a sending provider relies on a third party or the terminating carrier, it must pay the carrier, which in effect it has hired as a subcontractor for performing that function.

Third party carriers that bridge the gap between originating and terminating carriers must be compensated for the services they provide. In direct connection, bill and keep makes sense. For one, it is more efficient to require the terminating carrier to recover its costs directly from its own end user customers, who have chosen their network provider, than to permit recovery from other carriers. This is particularly true when traffic exchanged between two networks is roughly balanced.

This rationale for bill and keep has no bearing, however, on the question of compensation for intermediate third party carriers in cases of indirect interconnection. In that context, the sending provider hands off traffic to the third party carrier, which transports it over its own network and in turn hands it off to the IXC serving the 8YY customer. The sending provider has hired this third party to fulfill its obligation to deliver traffic to the 8YY customer's network. By definition, the third party provider has no contractual relationship with either the calling party or the called party and it therefore may not recover from either one the costs that it incurs in providing these third party services. Instead, its only relevant customer is the sending carrier, from whom it must recover its costs; and the sending provider is free to pass through those costs to its end users. The financial arrangement gives the sending provider appropriate incentives either to build out its network or to outsource the same network functions to a third party, depending on whether it is more economically efficient to build or to buy. The Commission would destroy those incentives if it forced third party intermediaries to perform these functions for free, with no hope of cost recovery from anyone who is involved in the relevant traffic exchanges and who causes the relevant costs.

Although many of those carriers may also have end users of their own, there is no rational justification for imposing on those retail customers the costs of wholesale services designed to support calls between other carriers' retail customers. The FCC should avoid putting competitive tandem/transport access providers in an intermediary position in the call path out of business by mistakenly subjecting them to a bill and keep regime intended for carriers who are serving their own end user customers. This is particularly true in the context of 8YY calling where the only carrier that receives revenue from end users for the traffic is the IXC that service the 8YY customer.

V. The Commission Should Adopt a Rule that Requires Terminating Carriers to Accept Requests from Originating Carriers to Directly Interconnect.

The Commission asks whether wireless carriers refuse to connect directly with other providers in order to facilitate revenue sharing and if so, how that practice affects intercarrier compensation.[21] O1 agrees with the commenters that advise the Commission of the harm that is caused to the intercarrier compensation system by carriers who refuse requests for direct interconnection. O1 agrees that the Commission should require carriers, including CMRS providers, to make direct interconnection available to both IXCs and competitive LECs.[22] O1 supports the proposal of several competitive LECs that all wireline and wireless carriers make direct connections available to requesting carriers that send or receive at least four T-1s of originating and/or terminating traffic per month (or for IP networks or other modern technology, 200,000 monthly MOUs sustainable average over a 30-day period) for all traffic with a zero rate per MOU.[23]

In several previously filed comments and ex parte filings, O1 described in great detail how it has been harmed by the denials of direct interconnection requests by AT&T Mobility and T-Mobile and the increase in switched access and transport prices that resulted from requiring O1 to route the traffic indirectly.[24] O1 incorporates those filings by reference herein.

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[21] *FNPRM* at ¶89.
[22] *T&P Comments* at 28-29; *West Comments* at 13-16.
[23] Letter from Philip Macres, Counsel for Consolidated Communications et al, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 & 07-135, CC Docket No. 01-92 at Attachment p. 2 (filed Dec. 4, 2017).
[24] Reply Comments of O1 Communications, Inc., In the Matter of Connect America Fund, WC Docket No. 10-90, CC Docket No. 01-92 (Nov. 20, 2017); *Notice of Ex Parte Presentation of O1 Communications, Inc*., WC Docket Nos. 10-90 and 07-135, CC Docket No. 01-92 (Jan. 8, 2018); *Ex Parte Presentation,* WC Docket Nos. 10-90 & 07-135, CC Docket No. 01-92 (Jan. 11, 2018); Comments of O1 Communications, Inc.. *In the Matter of Updating the Intercarrier Compensation Regime to Eliminate Arbitrage*, WC Docket No. 18-155 (July 20, 2018); Reply

CONCLUSION

For the reasons described above, the Commission should (1) confirm its policy against IXC self-help non-payment tactics in disputes with LECs over intercarrier compensation charges and impose penalties on IXCs that fail to comply; (2) clarify that competitive LEC originating access charges should be benchmarked to the competing incumbent LEC location where the access service functions are performed; (3) narrowly tailor rules to address the abusive practices of bad actors that have made fraudulent calls to toll free numbers based on the record developed in the proceeding specifically opened to address those abuses; (4) avoid adopting rules that eliminate competition in the intermediate local or long distance markets; and (5) adopt a rule that requires terminating carriers to accept requests from originating carriers to directly interconnect.

Dated this 1st day of October 2018.

Respectfully Submitted,

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